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Adoption Regulations Docket Room, SA-29
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FROM: Albert S Wei
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RE: Comments on State Department Regulations on Intercountry Adoption
State/AR-01/96

I am pleased to have the opportunity to submit comments on the latest draft of the State Department Regulations on Intercountry Adoption, State/AR-01/96. My objective in this submission is to emphasize several areas of particular concern to me.

By way of introduction, I am a private citizen, an adopted person of Korean descent, a member of the Board of Directors of the Evan B Donaldson Adoption Institute and a member of the Advisory Council on Intercountry Adoption. I support, without reservation, the recommendations of both of those organizations, which I assisted in drafting, as well, in principle, the recommendations of Ethica and the American Adoption Congress. I have had the privilege of being involved, in a *pro bono* capacity, in work, both legislative and post-legislative, on the IAA 2000 and the US ratification of the Hague Convention, since 1997. I am not involved in adoption in a professional capacity.

In general, I believe that the State Department has done an outstanding job in synthesizing the often divergent constituencies involved in the debate over US Hague implementation, and I congratulate the Department for its thoughtful and disciplined treatment of these varied perspectives in its September, 2003 draft regulations.

General Observations

The IAA focuses on three interlinked components, which should serve as overriding considerations in preparing and evaluating these three subparts:

- (i) **Standards** which protect the clients of the inter-country adoption process – US adoptive families (adopted persons and adoptive/potential adoptive parents) and US and, where they are parties to US adoptions, foreign birth parents;
- (ii) **Accountability** to the clients, to the American public and to the state of: (a) the accredited agencies and persons, (b) the accrediting entities, and (c) Federal agencies charged with the administration and oversight of the processes and programs envisioned by the IAA; and

- (iii) **Transparency** of the administrative and oversight processes and programs envisioned by the regulations, also to the clients, the public and the state.

All three components are integral parts of any implementation by the US of the Hague Convention, and I believe that there is a clear state interest in ensuring that they are each fully reflected in the regulations.

Standards

The regulations have made substantial progress toward identifying and codifying a set of standards which protect adoptive families; however, I respectfully submit that further work is required in the following areas:

- (i) **Anti-Child Trafficking.** Further refinement of the proposed regulations is needed before the rights of children and birth parents are adequately protected by these standards as well, particularly with respect to the IAA's anti-child-trafficking provisions;
- (ii) **Enhanced Regulation of Agents.** Significant work is still required to enhance and specify the authority of the State Department and its contractors (including the accrediting entities) to monitor and regulate the business practices of American accredited agencies and approved persons with respect to their foreign agents, both within and beyond the State Department's excellent proposal mandating Foreign Supervised Provider designation for these agents; and
- (iii) **Liability and Insurance Considerations.** If these business standards are improved through rigorous monitoring and regulation, then, perhaps, certain requirements imposed by the current draft of the regulations mandating the assumption by accredited agencies and approved persons of legal liability and commercial insurance responsibility for the actions of their agents may, conceivably, be relaxed for that subset of primary service provider demonstrably adhering to best practices.

Accountability

The regulations have made substantial progress toward establishing a theory and framework for regulation. I respectfully submit, however, that further details are required in the regulations to facilitate the implementation of this theory and framework, particularly in the following areas:

- (i) **Right to Complain.** I remain extremely concerned that the complaint process, beyond complaints to individual accredited agencies or approved persons, remains restricted to birthparents, adoptive parents and adoptees. Often, such parties fear retaliation or are concerned about possible immigration consequences. Thus, a role must be preserved to enable non-governmental organizations and other similar representatives to complain on behalf of the directly effected parties and in the composite directly to the Complaint Registry and/or the State Department;
- (ii) **Function of Accrediting Entities.** I recommend that the following concepts be included and/or further developed in the regulations:

- (a) provisions to facilitate the flow of information between and among accrediting entities, to ensure the sharing of best practices;
 - (b) provisions to prevent agencies seeking accreditation or persons seeking to be approved from "shopping" for the least rigorous accrediting entities;
 - (c) provisions explicitly discouraging development of a system based on competition between accrediting entities for the business of accredited agencies and persons, given the intrinsic ethical conflicts that would result; and
 - (d) provisions that provide for specific State Department oversight to ensure that accrediting entities develop comparable, consistent and appropriate standards; and
- (iii) **Function of the Central Authority.** I recommend the addition of rules requiring the State Department to communicate regularly with other Central Authorities, requiring the State Department to pro-actively share information on accrediting entity actions, complaint registry contents and observed patterns and trends and to pro-actively solicit similar reciprocal information.

I do welcome the distinction between primary providers and supporting/supervised agencies and the establishment of clear liability chains which end and begin with accredited agencies and persons.

Transparency

I recognize the need to allow accredited agencies and persons to protect the private information of their clients, as well as their professional reputations from invalid or spurious complaints; however, I can see no state interest in excessively safeguarding information gathered by the accrediting entities. Information on documented and validated incidents of complaint or mis-conduct, especially those which resulted in censure, as well as non-proprietary information on practices and finances, should not be designated as being confidential. Under the IAA, accredited agencies and persons seek the privilege of performing a public service required under a public law. As such, they should recognize that, in taking on such a role, they will be subject to a degree of scrutiny.

Similarly, I believe that all aspects of the operation of the accrediting entities, except for those which involve the handling of the proprietary information of clients should be open to potential scrutiny. They are taking on the role of a substitute regulator in place of a Federal agency, and thus, except where provided for by law, they should not be subject to special protections or regulatory forbearance.

As another general matter, it is imperative that adequate mechanisms be created to make the operation of the IAA's processes and programs clear to the clients and to advise clients of their rights under the IAA, both before adoptions, during adoptions and after adoptions, through-out the lifetime of adopted persons.

Specific Recommendations

ANTI-CHILD TRAFFICKING

§96.36 Prohibition on child buying.

Firmer measures must be taken to prevent child buying. To this effect, I support the recommendations of Ethica in respect of §96.36.

I recommend the addition of the following language to §96.36(c), to ensure that relinquishing birthparents are aware of how to pursue complaints in the case of child buying, relinquishment fraud or other malfeasance:

"In each Convention adoption, the agency or person and/or its supervised agent(s) will provide to birthparent(s) and/or entity/entities responsible for the pre-placement care of the child with a written notice, in a form approved by the Secretary, advising the recipient of his or her rights under US law with respect to relinquishment and placement of his or her child and, where applicable, his or her rights to legal representation and providing contact information for complaints or inquiries to the recipient for the US Central Authority and, where applicable, local US consular resources."

US consular officials in countries sending children to the US for purposes of adoption should be trained and equipped to provide support to birthparent complainants in cases of illegal adoption, thereby enabling and encouraging foreign birthparents victimized by fraudulent practices to come forward.

I also recommend the addition of the following language to §96.36(d), to incentivize accrediting entities to report cases of fraud concerning the relinquishment of parental rights or the giving of parental consent relating to the adoption of a child under the Convention:

"Accrediting entities shall pro-actively identify, investigate and, where appropriate, refer to the US Attorney General and the US State Department for legal action suspected violations of Section 404(a)(2)(B) (USC 14944) of PL 105-279."

CONFIDENTIALITY

§96.26(a) Protection of information and documents by the accrediting agency.

Accredited agencies and approved persons apply for the privilege of providing Hague Convention adoption services. As such, their business practices and professional practices, as agents of the public mandate to facilitate and arrange intercountry adoptions, must not be shielded from public scrutiny, except to the extent required under other existing Federal laws (*e.g.*, with respect to the disclosure of employee records, information uses restricted under HIPPA and so forth) and with respect to client information. I urge the State Department to reject the arguments of service providers and their lobbyists that they have proprietary business technologies and know-how which need to be protected by these rules, except to the extent that they have secured explicit intellectual property rights under US patent and trademark law. Service providers seem to believe that they should be allowed to maintain secret networks of foreign contacts. I

believe that such a notion of proprietary knowledge is inconsistent with the intent of the Hague Convention and the IAA 2000 and does not exist in the best interests of children or the other clients of intercountry adoption. The US government should be under no obligation to provide privileged standards of protection to US service providers from competition by other US providers, and any advantage to be gained from state complicity in concealing from public view the nature of these practices must be subsumed to the state interest in promoting transparency and regulating the conduct of US corporations involved in Convention adoptions abroad and domestically.

I respectfully request that §96.26(a) be re-written as follows:

"Use and disclosure by the accrediting entity of all documents and information received by the accrediting entity about the agency or person in connection with the performance of its accreditation or approval, oversight, enforcement, renewal, data collection, and other functions under its Agreement and this part shall be governed by applicable federal law, or applicable state law, including laws governing confidentiality of healthcare records, employment records, or other areas as specified by US statute, and shall be subject only to the limitations in §96.26(b)."

I also support the recommendations of the American Adoption Congress in respect of §96.26.

RIGHT TO COMPLAIN

§96.69 Filing of complaints against accredited agencies and approved persons.

Provisions should be added to allow the filing of complaints directly to agencies and, where applicable, directly to the complaint registry by adoptive parents and prospective adoption parents, birthparents, adoptees, their representatives, both individually and, where applicable, as a class, and other "interested persons."

ENHANCED REGULATION OF AGENTS & LIABILITY AND INSURANCE

A number of organizations have expressed concern that the September 15, 2003 draft of the 22 CFR Part 96 rules extend, with respect to accredited entities and approved persons serving as primary providers, liability (§96.45 and §96.45(b)(8) and (c)(1),(2) and (3) and §96.46(b)(9) and (c)(1),(2) and (3)) and insurance requirements (§96.33(g) and (h)) to supervised providers. Their concern arises out of their belief that these requirements may increase their costs of doing business and/or prevent them from obtaining commercial liability insurance. I believe that some of these concerns may be valid, and, furthermore, I am concerned that these requirements may place undue emphasis on compensation and liability as opposed to standards-based accreditation and enforcement. In light of the foregoing, I respectfully recommend that the State Department consider changing the regulations to accommodate an alternative approach to insurance and liability.

Philosophically, I believe that the Convention is a tool to advance the protection of children involved in intercountry adoption while facilitating legal intercountry adoptions.

pursuant to the Convention. In this context, I believe that the primary objectives of rule-making in relation to PL 106-279, with respect to liability and insurance, is to incentivize accredited agencies and approved persons to minimize or avoid potentially risky behavior and to facilitate legal adoptions. These objectives are best achieved through the consistent and rigorous application and enforcement, through-out the liability chain of intercountry adoption, of standards of accreditation (as mandated under Title II of PL 106-279, 42 USC 14921 through 42 USC 14924) and of the civil and criminal penalties in relation to certain categories of malfeasance or fraud (as mandated under Title IV of PL 106-279, 42 USC 14944). I believe that the compensation, through civil court actions, of families adversely affected by the negligent, malfeasant or fraudulent practices of accredited agencies, while laudable, was not an objective in drafting the regulations.

I believe that the primary and supervised provider concepts (§96.14, §96.44, §96.45, and §96.46) are necessary and desirable tools for the achievement of these accreditation and enforcement objectives. The failure of US persons involved in a primary capacity in the provision of adoption services to adequately supervise their contracted agents, domestically and abroad, has, in all too many cases, encouraged risky, negligent and illegal behavior on the part of those agents. Recent and continuing cases involving alleged misconduct by the foreign agents of US adoption agencies in Cambodia, Guatemala, Haiti, Liberia, Romania, Vietnam and elsewhere are disturbing cases in point. The prevention and the administrative and judicial sanction of such behavior are absolutely consistent with the objectives of the Convention and required by statute, and the regulations should more effectively facilitate these objectives. However, I also believe that these accreditation and enforcement objectives should not be construed in such a way as to encourage private litigious behavior. Encouragement of civil litigation and potentially large out-of-court settlements is not, and should not be, a substitute for effective regulation.

I recommend that changes be made to the regulations which have the following effects:

- (a) Preservation of the primary and supervised provider concepts in the liability chain of intercountry adoption as set forth in §96.14, §96.44, §96.45 and §96.46;
- (b) Augmentation of the enforcement, accreditation and maintenance of accreditation standards and procedures with respect to such agents, by way of modification of the various standards sections in Subpart F of the regulations (e.g., by adding rigorous and specific requirements for investigatory look-through by accrediting entities to the practices, policies and due diligence procedures and outcomes used by accredited agencies and approved persons in dealing with agents/supervised providers) and in respect of permissible waivers as set forth in §96.39; and
- (c) Introduction of the concept of safe harbor assurances to primary providers who comply with or exceed these augmented standards and procedures in respect of their dealings with agents/supervised providers, therefore providing good primary providers with appropriate defenses against litigation under §96.45 and §96.46 and the option in §96.33 for primary providers to exclude supervised providers from liability insurance coverage where specified safe harbor standards are met.

§96.6 Performance criteria for designation as an accrediting entity.

Amends §96.6(c) to read:

"That it can monitor the performance of agencies it has accredited and persons it has approved, and, where applicable and set forth in these regulations, the practices of these agencies and persons with respect to their agents."

§96.7 Authorities and responsibilities for an accrediting entity.

Amends §96.7(a)(4) to read:

"Investigating and responding to complaints about accredited agencies, temporarily accredited agencies, and approved persons, and, respectively, to the extent set forth in these regulations, the agents of these accredited agencies and approved persons with which they contract and for which they are responsible."

§96.32 Internal structure and oversight.

Adds §96.32(d):

"The agency or person has in place [appropriate] procedures and standards for due diligence on and selection, monitoring and oversight of supervised providers."

§96.33 Budget, audit, insurance, and risk assessment requirements.

Amends §96.3(h) to read:

"The agency or person maintains insurance in amounts reasonably related to its exposure to risk, including, subject to the exclusions permitted in the safe harbor provisions as specified in §96.45(e) and §96.46(e), the risks of providing services through supervised providers, but in no case in an amount less than \$1,000,000 per occurrence."

§96.35 Suitability of agencies and persons to provide adoption services consistent with the convention.

Amends §96.35(b) by appending:

After the words "or any former names" but before the colon the following words, in a parenthetical expression, "(for purposes of the following information, 'agency or person' shall include any agent or agents of the agency or person where such agent or agents are materially involved in any of the six 'adoption services' defined in §96.2)".

§96.39 Information disclosure and quality control practices.

Adds §96.39(a)(4):

"A statement explaining the general risks reasonably associated with work undertaken by the agency or person or any entities other than the agency or person with whom the prospective client(s) can expect to work in the United States and in the child's country of origin."

Adds §96.39(c):

"Where the agency or person is acting as a primary provider as defined in §96.14, the agency or person fully discloses in writing to client(s), prior to commencement of adoption services, the following information:

- (a) the identity of each supervised provide with whom the client(s) can expect to work in the United States and in the child's country of origin;

- (b) a statement of the relationship(s) between the client(s), the primary provider and each supervised provider, including specification of the flow of responsibilities, liability and funds between the various parties;
- (c) the description of the services to be provided by each supervised provider;
- (d) the responsibilities of the client(s) with respect to each supervised provider; and
- (e) an assessment of the specific risks reasonably associated with work undertaken by each supervised provider."

Amends §96.39(d) to read:

"The agency or person requires a client or prospective client to sign waivers of liability in connection with the provision of adoption services in Convention cases, only where:

- (1) the waiver(s) specifies the specific events of risk or liability being waived;
- (2) the waiver(s) use a uniform waiver form approved by the Secretary; and
- (3) the agency or person does not obtain from any Convention adoption client any agreement containing exculpatory language through which the client is made to waive or appear to waive any of the client's legal rights, or which releases or appears to release the agency or person or their agents from liability for negligence or intentional wrongdoing."

[NB: The proposed language for §96.39(d)(3) is adapted from the draft comments of the American Adoption Congress.]

§96.40 Fee policies and procedures.

Adds §96.40(i):

"For the avoidance of doubt, where the agency or person is acting as a primary provider, the fee policies and procedures specified in §96.40(a) through (i) relate to both the primary provider and each supervised provider."

§96.41 Procedures for complaints and records and reports management.

Adds §96.40(i):

"For the avoidance of doubt, where the agency or person is acting as a primary provider, the procedures specified in §96.41(a) through (h) include any and all complaint(s) relating to both the primary provider and to any and all supervised provider(s)."

§96.45 Using Supervised Providers in the United States.

Amends §96.45(c)(1) to read:

"Assumes tort, contract, and other civil liability to the prospective adoption parent(s) for the supervised provider's provision of the contracted adoption services and its compliance with the standards in this subpart F, subject to the limitations specified in §96.45(e)."

Amends §96.45(c)(2) to read:

"Maintains a bond, escrow account, or liability insurance in an amount sufficient to cover the risks of liability arising from its work with supervised providers to extent that such liability is not limited in §96.45(e).

Adds §96.45(c):

"The fulfillment by an agency or person acting as primary provider or, where applicable, as supervised provider(s), of all of the following conditions, as specified, shall comprise a safe harbor for the primary provider from civil liability risk arising from the actions of the applicable supervised provider(s) and shall release the primary provider from the financial requirements in §96.45(c)(2) and the insurance requirements in §96.3(h) with respect to the extension of liability to the applicable supervised provider(s):

1. the primary provider has in place effective procedures for conducting investigatory due diligence on the supervised provider(s), including, not less than once per year, periodic unannounced checks/inspections of the operations and accounts of the supervised provider;
2. the supervised provider(s) is not/has not been the subject of any of the adverse actions described in §96.35(b)(1),(2),(3),(4),(6) or (7), within the specified time-frames;
3. the supervised provider(s) is in compliance with all provisions specified in §96.45(a)(1) through (3) and §96.45(b)(1) through (13);
4. the supervised provider(s) has provided adoption services in a minimum of ten [10] separate cases (adoptions) in the past five [5] years; and
5. the prospective adoptive parent(s) have been provided with and have executed a uniform waiver, approved by the Secretary, of the specific risks to them which might reasonably arise as a function of the work of the supervised provider(s)."

[NB: Since the safe harbor provision pertains to a particular supervised provider and most insurance policies are general in nature, to truly derive an insurance benefit from the safe harbor, the agency or person will have to fulfill the conditions of safe harbor for substantially all of the supervised providers with which they work.]

Amends §96.46(c)(1) to read:

"Assumes tort, contract, and other civil liability to the prospective adoption parent(s) for the foreign supervised provider's provision of the contracted adoption services and its compliance with the standards in this subpart F, subject to the limitations specified in §96.46(e)."

Amends §96.46(c)(2) to read:

"Maintains a bond, escrow account, or liability insurance in an amount sufficient to cover the risks of liability arising from its work with foreign supervised providers to extent that such liability is not limited in §96.46(e)."

Adds §96.46(e)

"The fulfillment by an agency or person acting as primary provider or, where applicable, as supervised provider(s), of all of the following conditions, as specified, shall comprise a safe harbor for the primary provider from civil liability risk arising from the actions of the applicable Foreign supervised provider(s) and shall release the primary provider from the financial requirements in §96.45(c)(2) and the insurance requirements in §96.3(h) with respect to the extension of liability to the applicable supervised provider(s):